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In the Supreme Court of the United States

OCTOBER TERM, 1978

No 79-77

STATE OF OREGON,

Petitioner,

v.

SHAWN ROBERT McGREW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Questions Presented	2
Constitutional Provisions Involved	3
Statement of the Case	3
Reasons for Granting the Writ	9
Conclusion	19
Appendix A: Opinion of Oregon Court of Appeals	23
Appendix B: Letter from Supreme Court	32
Appendix C: Motion to Suppress, Multnomah County	33

TABLE OF AUTHORITIES

Cases

	Page
Ball v. Gladden, 250 Or 485, 443 P2d 621 (1968)	6
Brown v. State, 4 Md App 261, 242 A2d 570 (1968)	11
Escobedo v. Illinois, 378 US 478, 84 S Ct 1758, 12 L Ed 2d 977 (1964)	10
Lung v. State, 420 P2d 158 (Okl Cr 1966)	11
Michigan v. Mosely, 423 US 96, 46 L Ed 2d 313, 96 S Ct 3211 (1975)	13, 17
Mikulovsky v. Schubert, 416 F Supp 55 (DC Wis 1976)	11
Miranda v. Arizona, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966)	2, 3, 9, 13, 19
Newhouse v. State, 420 SW 2d 729 (Tex Cr 1967)	11
People v. Dorado, 62 Cal 2d 338, 398 P2d 361, 42 Cal Rptr 169 (1965)	9, 10
State v. McGrew, 38 Or App 493, 590 P2d 755 (1979)	6, 7, 8, 12, 14, 15
Taylor v. Page, 381 F2d 717 (10th Cir 1967) *cert den* 389 US 1023, 19 L Ed 2d 670, 88 S Ct 598	11
Tolley v. Page, 436 P2d 242 (Okl Cr 1968)	11

Constitutional Provisions

United States Constitution, Amendment V	3
United States Constitution, Amendment XIV, § 1	3

Other Authorities

Dix, Mistake, Ignorance, Expectation of Benefit and the Modern Law of Confessions	19

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October Term, 1979

No. _____

STATE OF OREGON,

Petitioner,

v.

SHAWN ROBERT McGREW,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

The petitioner, State of Oregon, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of the State of Oregon entered in this proceeding on February 20, 1979.

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing defendant's conviction and remanding his case to the circuit court for retrial (Appendix A) is reported at 38 Or App 493, 580 P2d 755 (1979). The order of the Supreme Court of the State of Oregon denying the state's petition for review of the Court of Appeals' decision (Appendix B) is not reported.

JURISDICTION

The judgment of the Court of Appeals of the State of Oregon was entered February 20, 1979. The

Supreme Court of the State of Oregon denied a timely petition for discretionary review on April 17, 1979; and this petition for a writ of certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 USC § 1257(3).

QUESTIONS PRESENTED

1. Do the requirements of *Miranda v. Arizona,* 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694 (1966) apply to a situation in which a person unknown to the police arrives at the police station, expresses an intent to confess to an unsolved murder, and subsequently confesses?

2. Was respondent, who appeared unsolicited at the police station with the intention of confessing to a murder, improperly induced to waive rights guaranteed by *Miranda v. Arizona,* when a police officer, on being asked by respondent for help with his alcohol problem, replied that, "* * * there was very little that I could do for him unless he becomes involved in the system where he could receive some help" and on being asked, by respondent's companion out of respondent's hearing, whether he could get an attorney for respondent, replied that, "Yes, we certainly could, but if you are personally convinced that he committed this crime and if you are sure that he's responsible for this and an attorney tells Shawn not to say a word, then Shawn goes out the door; we don't

have a case against Shawn McGrew. We don't know Shawn McGrew."?

3. More generally, was respondent, under the totality of the circumstances, induced to waive his *Miranda* rights?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person * * * shall be compelled in any criminal case to be a witness against himself * * *"

United States Constitution, Amendment XIV, § 1:

"* * * [N] or shall any State deprive any person of life, liberty or property, without due process of law * * *"

STATEMENT OF THE CASE

A. General Background and Material Facts.

On June 29, 1977, respondent confessed that he had beaten Jeane Rosaline Dechamps to death on the night of June 27, 1977, on the grounds of Temple Beth Israel in Portland, Oregon. He was indicted by the Grand Jury of Multnomah County, Oregon, for murder and, prior to trial, filed a "Motion to Suppress" (Ex. C) the confession on the grounds that the statements were (1) involuntary and (2) obtained in violation of the rights guaranteed him by *Miranda v. Arizona, supra.* On December 12, 1977, after a hearing, the trial court denied the motion. (Tr. I, 214). Following his conviction for murder, respondent appealed to the Oregon Court of Appeals, claiming, *inter alia,* that he

had been improperly induced to waive *Miranda* rights. The Court of Appeals reversed under the following circumstances:

At about 9:30 p.m. on June 29, 1977, respondent and a companion, Mike Nielsen, arrived at the Central Precinct of the Portland, Oregon Police Department (Tr. I, 10-11). Nielsen introduced himself and respondent to the desk clerk, asked if she was familiar with the case of the Indian woman that was murdered up in Northwest Portland, and then announced that respondent had told him that he was the one that did it. Respondent remained silent and Officer Hunsperger was summoned. (Tr. I, 12). When Officer Hunsperger arrived, Mr. Nielsen asked him if he was familiar with the murder and, after an affirmative response, stated that, "Mr. McGrew believes that he's responsible for that crime." The officer asked respondent, "Is this true?" and respondent either nodded or verbally assented. (Tr. I, 30). The trial court found, as a fact, that respondent was attempting to turn himself in for a murder. (Tr. I, 21).

Respondent was then taken to an interview room (Tr. I, 30) and read his *Miranda* rights by Officer Hunsperger. (Tr. I, 31). Respondent nodded in the affirmative that he understood what had been said (Tr. I, 32). He was not in custody at that point, (Tr. I, 31), but after acquiring identification, calling Detective Sgt. Potter, and searching respondent, Hunspergerhandcuffed him (Tr. I, 33-34) and transported him, with Nielsen, to the Detective Division where they were turned over to Sgt. Potter. (Tr. I, 36). Officer Hunsperger testified that "Any time a suspect who is in custody is moved from one point to another, handcuffs will be used" and that he had not told respondent he was under arrest but did tell him that he was a suspect. (Tr. I, 35). The handcuffs were taken off at the Detective Division. (Tr. I, 36). The trial court found that from the point the handcuffs were put on him, his circumstances were such that the *Miranda* warning was required, i.e., that he was in custody or was a focal suspect. (Tr. I, 193).

Detective Kagey (Tr. I, 64), who was assigned to investigate the murder, was apprised of the situation (Tr. I, 64-65), and met respondent and Nielsen in an interview room (Tr. I, 66), where Nielsen told Kagey that he had advised respondent not to make any statements until he had a chance to talk to an attorney. (Tr. I, 67). Officer Kagey testified that respondent was not a suspect at that point. (Tr. I, 74). He did not, at that time, tell respondent he was under arrest or that he could not leave, nor did he restrain him. (Tr. I, 77).

Kagey and Nielsen had two or three conversations during this period. (Tr. I, 76, 93). On the second or

third conversation, Nielsen asked Detective Kagey, in the hallway and out of respondent's presence, "Could you get an attorney for Shawn at this point?" and Detective Kagey replied;

> "Yes, we certainly could, but if you are personally convinced that he committed this crime and if you are sure that he's responsible for this and an attorney tells Shawn not to say a word, then Shawn goes out the door; we don't have a case against Shawn McGrew. We don't know Shawn McGrew."[1] (Tr. I, 93).

After this series of conversations between Kagey and Nielsen, the parties moved to a different interview room. (Tr. I, 77). During the course of discussion in the second interview room, Detective Kagey became aware that respondent had been hospitalized for al-

[1]The Court of Appeals opinion states that,

"Although the statement was made to Nielsen and not the defendant, the police were aware of defendant's reliance on Nielsen and that the message would be communicated to the defendant to give up the right to remain silent." *State v. McGrew*, 38 Or App 493, 499, 590 P2d 755, 758 (1979).

There is no evidence to support this assertion and the testimony of Officer Kagey was that he was not enlisting Nielsen to assist in getting defendant to talk; he was merely telling him what would happen. (Tr. I, 96). The Court of Appeals plainly erred in stating as a fact that the police were aware that the message would be communicated to McGrew when the trial court's implicit finding was to the contrary. *Ball v. Gladden*, 250 Or 485, 443 P2d 621 (1968). The argument below, which is that the statement is an inducement to exercise *Miranda* rights and not to waive them, assumes that the Court of Appeals was for some reason correct.

The Court of Appeals' statement that, "Defendant was 17 years old with the mental acuity of a 12 or 14-year old child." 38 Or App at 499, is similarly inaccurate and highly misleading. (See, Tr. I, 142-156).

coholism. At that point respondent requested help with his alcohol problem[2] and Detective Kagey,

> "* * * [I]ndicated to Shawn that if he in fact was responsible or involved in this particular incident that he or that there was very little that I could do for him unless he became involved in the system where he could receive some help." (Tr. I, 78-79).

Respondent did not, during this period, indicate either a reluctance to discuss the crime or that he wanted to have an attorney present. (Tr. I, 79). At about 10:20 p.m., after the arrival of Detective Blodgett, Kagey's partner, respondent was re-advised of his *Miranda* rights. (Tr. I, 80, 110-12). A tape recorded confession was taken in which respondent expressly acknowledges that he is willing to answer questions and does not desire the presence of an attorney. (Trial Ex. 23A). Following the statement, respondent was told that he was under arrest. (Tr. I, 85). The confession is detailed and recounts a particularly brutal and unprovoked murder.

B. Manner in Which the Federal Question Was Raised.

[2]The testimony at the suppression hearing, the only testimony available to the trial court on the suppression issues, does not support the Court of Appeals' assertion that the detective's statement was made "* * * in response to defendant's request for help with his alcohol problem. * * *" 38 Or App at 499. But since testimony supportive of the assertion was elicited at trial (Tr. 509), petitioner does not dispute it.

The federal question in this case was originally raised by respondent in a Motion to Suppress prior to trial as follows:

> "Defendant moves the Court for an Order suppressing any and all evidence and testimony regarding any statements made by him on or about June 24, 1977 to Detectives Blodgett and Kagey of the Portland Police Bureau on the grounds that the statements were (1) involuntary and (2) obtained in violation of defendant's constitutional rights guaranteed by *Miranda v. Arizona.*"(See Appendix C).

Following a hearing held December 12, 1977 the trial court orally denied the Motion to Suppress. (Tr. I, 214). On appeal to the Oregon Court of Appeals, the denial of the Motion to Suppress was assigned as error in respondent's brief: "The circuit court erred in denying the defendant's motion to suppress evidence of statements made by the defendant to police officers who violated the defendant's constitutional rights to be free from compelled self-incrimination." (App. Br. at 9). In reversing the trial court's order denying the Motion to Suppress, the court of appeals stated:

> "We conclude the state has failed to demonstrate the waiver was voluntary and not merely a response to the detective's inducement." *State v. McGrew,* 38 Or App 493, 500, 590 P2d 755, 759 (1959).

In seeking review of the Court of Appeals' decision, petitioner stated:

> "The Court of Appeals erred in holding that the defendant's waiver of his *Miranda* rights was involuntary."

The federal question presented in this case has been properly raised and appropriately reserved at all stages.

REASON FOR GRANTING THE WRIT

A. THE OREGON COURT OF APPEALS HAS APPLIED THE WAIVER PRINCIPLES OF *MIRANDA V. ARIZONA, SUPRA,* TO A FACT SITUATION IN WHICH THOSE PRINCIPLES HAVE NO APPLICATION.

In *Miranda v. Arizona, supra,* this Court states:

> "Any statement given freely and voluntarily without compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated. There is no requirement that police stop a person who enters a police station and states that he wishes to confess to a crime, or a person who calls the police to offer a confession or any other statement he desires to make. Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." 384 US at 478.

Illustrating this principle, the Court cites *People v. Dorado,* 62 Cal 2d 338, 354, 398 P2d 361, 371, 42 Cal Rptr 169, 179 (1965). In *Dorado,* during the course of a statement of general principles for the admissibility of confessions following *Escobedo v. Illinois,* 378 US 478,

84 S Ct 1758, 12 L Ed 2d 977 (1964), the California Supreme Court notes that "Indeed, any statements obtained without coercion, including the unsolicited, spontaneous confession, given in the absence of the requirements for the accusatory stage, may be admitted into evidence." 398 P2d at 371. In a footnote the Court states that a confesion given in the following hypothetical situation posed by the Attorney General is obviously admissible:

> "What about the person who is not known as a suspect but wants to confess an unsolved crime? * * * Shall the police stop him when he rushes into a police station and cries in distress that he wants to confess to a crime and tell him to be quiet until an attorney is obtained to represent him?" 398 P2d at 371.

In this case, the respondent, who was not known as a suspect, arrived unsolicited at the police station with the intent to confess to a murder, admitted having committed the murder, and subsequently, pursuant to questioning, confessed details of the murder. With the exception of the Raskolnikovian distress posited by the *Dorado* hypothetical, an hysteria not apparently necessary to the principle, this case involves the same kind of unsolicited, volunteered confession. Cases from other jurisdictions have, so far as we are able to ascertain, uniformly allowed statements made by defendants who arrive unsolicited at the police station and confess crimes. *See, Taylor v. Page,* 381 F2d 717

(10th Cir 1967) *cert den* 389 US 1023, 19 L Ed 2d 670, 88 S Ct 598; *Mikulovsky v. Schubert,* 416 F Supp 55 (D C Wis 1976); *Lung v. State,* 420 P2d 158 (Okl Cr 1966); *Tolley v. Page,* 436 P2d 242 (Okl Cr 1968); *Newhouse v. State,* 420 SW 2d 729 (Tex Cr 1967). *See also, Brown v. State,* 4 Md App 261, 242 A2d 570 (1968). Since volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by the holding in *Miranda,* the Court of Appeals erred in applying the waiver principles of *Miranda.*

B. EVEN ASSUMING THAT *MIRANDA* WAIVER PRINCIPLES ARE APPLICABLE, THE OREGON COURT OF APPEALS HAS IMPROPERLY APPLIED THOSE PRINCIPLES BY TRANSFORMING THE GENERAL VOLUNTARINESS STANDARD INTO A PRINCIPLE WHICH EXCLUDES FROM EVIDENCE ANY CONFESSION PRECEDED BY A STATEMENT WHICH MAY BE CHARACTERIZED AS DESIGNED OR INTENDED TO INDUCE DEFENDANT TO CONFESS.

The Court of Appeals' opinion in this case contains many mistakes in applying *Miranda* waiver rules; some subtle, some not subtle. The most serious errors are (1) a failure to distinguish between cases in which a defendant has requested counsel and cases in which no assertion of a *Miranda* right occurs, which leads the court to equate the two situations and to apply principles derived from the former to the latter cir-

cumstance, and (2) the analysis of Officer Kagey's statement to Nielsen that he could get an attorney for respondent but if the "* * * attorney tells Shawn not to say a word, then Shawn goes out the door * * *" as an inducement to waive *Miranda* rights rather than an inducement to exercise them.

The Court of Appeals' opinion states, "The police may ask the defendant if he will waive his right to silence, but they may not persuade him to do so." 38 Or App at 498. It then cites six Oregon Court of Appeals cases in support of the proposition. Each of these cases, as the court acknowledges, involved an issue of waiver either after a request for counsel or after an assertion of the right to remain silent. But the court then states "This is not a material factor distinguishing the issue of waiver in the case at bar." 38 Or App at 498. In support of this notion, the court indicates that it sees no difference between the two situations because, "The right to counsel and the right to remain silent existed whether or not the defendant verbalized his intent to assert these rights, and the requirement that these rights be waived prior to interrogation does not evaporate if defendant does not assert them." 38 Or App at 498-99.

In establishing the principle that the police may not persuade a defendant to waive *Miranda* rights in this way the Court of Appeals is imposing the very

strict standard derived from the "interrogation must cease" rule in *Miranda*[3] to the distinguishable situation governed by a more general voluntariness standard.[4] The court has blurred the distinction between a waiver following an assertion of a *Miranda* right and a waiver where no prior assertion of a *Miranda* right occurs.

The all but *per se* application of the principle of nonpersuasion in the context of an asserted right is rational and the fact that *Miranda* had apparently established a *per se* exclusionary rule once a defendant has asserted his rights dominates the cases arising out of that factual pattern. The loosening of the *per se* rule, where a right to remain silent is asserted, in *Michigan v. Mosely,* 423 US 96, 46 L Ed 2d 313, 96 S Ct 3211 (1975), does not affect the common sense prin-

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[3] "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked. If the individual states that he wants an attorney, the interrogation must cease until an attorney is present." *Miranda v. Arizona,* 384 US 436, 473-74 (1966).

[4] "* * * But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. * * *

"* * * * *

"Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda v. Arizona,* 384 US 436, 475-76 (1966).

ciple, adumbrated in the cases, that a person who has asserted a *Miranda* right has made a decision to exercise that right and the government should bear a heavy burden of showing that his change of position was not the result of improper methods. But the presumption that the will of the defendant was overborne and that the subsequent waiver and confession were involuntary depends on the fact that the defendant first asserted *Miranda* rights. This same strong presumption is misplaced when the defendant has neither asserted his rights nor waived them.

The Court of Appeals identifies two controversial truisms as "persuasions" or "inducements" and holds that they were each "obviously" designed or intended to induce respondent to waive his *Miranda* rights. After imposing on the prosecution a "* * * burden [that] includes the requirement that the prosecution show the waiver was not induced by the police." 38 Or App at 498, the court concludes "* * * the state has failed to demonstrate the waiver was voluntary and not merely a response to the detective's inducement." 38 Or App at 500. This is the application of the virtually *per se* rule derived from the "interrogation must cease" context involving the prior assertion of a *Miranda* right to a distinguishable waiver issue.

There are many correct things said in the opinion. It is hard to demonstrate, for instance, that when the

court shifts focus from the non-persuasion rule, states "The issue is the voluntariness of the waiver at the time it was given." 38 Or App at 499, and purports to apply that standard, they are not in reality applying a general voluntariness measure but a voluntariness standard informed by a *per se* non-persuasion rule. That the Court of Appeals has applied a *per se* rule while failing to identify it as such is, we think, made clear by an examination of the inducements on which it relies and the circumstances in which they occur. One of the unique features in this case, the feature relied on in part A of this argument, is that the defendant, without any external pressure and without prior police involvement with him regarding the case, volunteered a confession. His first meaningful affirmative act in the police station was to acknowledge his responsibility for the murder and during the course of conversations in which he was twice apprised of his *Miranda* rights he never expressed a reluctance to confess. It is difficult to hypothesize a less coerced confession and the most elementary inference, when a defendant attempts to make an unsolicited confession, is that this original voluntary state of mind continued through the waiver. The inference is as elementary and as powerful as the inference from the fact that a defendant asserts his *Miranda* rights that a subsequent waiver is involuntary. Yet the Court of Appeals

holds that notwithstanding defendant's uncoerced demonstration of his will to confess, his will was overborne and he was "induced" to waive his rights.

Chronologically, the first of the statements on which the court relies was Detective Kagey's response to Nielsen's question, "Could you get an attorney for Shawn at this point?" Detective Kagey replied,

> "Yes, we certainly could, but if you are personally convinced that he committed this crime and if you are sure that he's responsible for this and the attorney tells Shawn not to say a word, then Shawn goes out the door; we don't have a case against Shawn McGrew. We don't know Shawn McGrew."

Assuming that "* * * the police were aware of defendant's reliance on Nielsen and that the message would be communicated to the defendant." 38 Or App at 499, though the testimony is to the contrary, the content of the statement is the proposition that if the defendant gets an attorney and follows the attorney's advice not to talk, he will go, "out the door"; he will not be charged with murder. This is a curious inducement. It is the opposite of the kinds of statements ordinarily characterized as inducements. It is, in fact, an inducement to exercise *Miranda* rights, not to waive them.

Counting the detective's statement as an inducement is inconsistent with the fundamental purposes of *Miranda*. The *Miranda* rules are designed to ensure the voluntariness of confessions and an awareness of

risks and alternatives. Yet, by the court's formulation, the confession was so obviously desired by the defendant that the police were able to use the threat of not charging him if he failed to waive his rights. If this statement can be counted as an inducement providing grounds for holding a waiver involuntary, then the very rules designed to protect against a coerced confession are employed to protect defendant from doing what he manifestly desires. Using the rules in this way makes no sense; it "imprison[s] a man in his privileges". *Michigan v. Mosley, supra,* 423 US at 109 (White, J., concurring).

Assuming that this statement cannot count as an inducement, the respondent is left with the assertion that under the totality of the circumstances the waiver was shown to be induced and was involuntary because, in response to a request for help with his alcohol problem, Detective Kagey indicated to respondent that there was very little that he could do for him unless he became involved in the system where he could receive some help. But this position is surely not tenable. The statement is a simple truism, uttered in the course of conversation, to the effect that the police officer cannot provide counselling for alcoholism but that the respondent could receive some help within the system, i.e., in prison. It is not a threat, nor is it trickery or cajolery. And while it seems fair to characterize the

offer of aid on incarceration as an incidental "inducement", it seems patently unreasonable to balance that fact in the totality of these circumstances and hold the waiver impermissibly induced. It is plain that respondent was not induced to waive his rights or confess to this murder by the promise of alcoholism counselling while incarcerated; his motivations were internal.

The issue of involuntariness of the waiver in these circumstances could only arise if a *per se* rule against persuasive statements of any kind obtains. It is for this reason that the apparently innocuous, but also apparently absolute rule that, "The police may ask the defendant if he will waive his right to silence, but they may not persuade him to do so" raises acute difficulties for there are many kinds of statements, often quite harmless and conversational statements, that can be identified as persuasions of one order or another. And in its application, the Court of Appeals has demonstrated that it does not mean just that successful persuasion is impermissible, but that any statement that is characterized as a statement designed to persuade will trigger the exclusionary rule.

The court, in characterizing each of the statements, concludes that the one "was obviously designed to induce" and the other had "the obvious intent * * * to induce" a waiver. This emphasis on the intent of the

statements rather than their effect indicates that a prohibition against statements designed to persuade is being applied rather than a voluntariness standard. Such a rule is inconsistent with *Miranda v. Arizona, supra,* and makes it very difficult for police officers to converse with criminal suspects in any ordinary way.

C. THE WAIVER OF *MIRANDA* RIGHTS IN THIS CASE WAS VOLUNTARY UNDER ANY PROPER USE OF THE TERM.

The individual principles, apart from the general voluntariness standard, which have been applied in determining whether a particular confession or waiver was voluntary are dissonant and uncoordinated. See, Dix, Mistake, Ignorance, Expectation of Benefit, and the Modern Law of Confessions, 1975 Wash. Univ. L. Q. 275. It is urged that this court impose some order in this area.

Under any known principle arising out of the voluntariness area, with the exception of the principle applied by the Oregon Court of Appeals, the waiver of *Miranda* rights, assuming it was required, was voluntary.

CONCLUSION

The decision of the Oregon Court of Appeals has applied the requirements of *Miranda v. Arizona,* in a case in which it should not apply and has improperly applied the waiver principles of *Miranda* to exclude

any confession or admission which follows a statement which can be characterized as designed to induce a waiver of *Miranda* rights. For the reasons given above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals of the State of Oregon.

Respectfully submitted,

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July 1979

APPENDICES

Appendix A

No. 75—February 20, 1979

IN THE COURT OF APPEALS OF THE STATE OF OREGON

STATE OF OREGON, *Respondent,*
v.
SHAWN ROBERT McGREW, *Appellant.*
(No. C 77-08-11378, CA 10780)

Appeal from Circuit Court, Multnomah County. James R. Ellis, Judge.

Argued and submitted November 21, 1978.

Richard M. Rogers, Portland, argued the cause for appellant. With him on the briefs were Gary D. Babcock, Public Defender, and James E. Mountain, Jr., Deputy Public Defender, Salem.

Jan P. Londahl, Assistant Attorney General, Salem, argued the cause for repondent. With him on the brief were James A. Redden, Attorney General, and Walter L. Barrie, Solicitor General, Salem.

Before Schwab, Chief Judge, and Lee, Richardson, and Joseph, Judges.

Reversed and remanded for new trial.

RICHARDSON, J.

Defendant appeals his conviction for murder, ORS 163.115, claiming the court erred in denying a motion to suppress his confession and denying a motion for a

new trial on the ground his confession was not admissible. Both claims of error raise the same issue.

There was very little conflict in the evidence presented at the hearing on defendant's motion to suppress his confession. We take the facts from this hearing record.

On June 27, 1977, the body of a murdered woman was found on the grounds of a synagogue in Portland. Subsequently Mike Nielsen, a friend of defendant, heard that defendant believed he committed the murder. Nielsen contacted defendant and was told by defendant that he wished to turn himself in. Nielsen accompanied defendant to the police station. Enroute, Nielsen told defendant that he did not have to say anything when they got to the police station and that defendant could wait until he talked to an attorney.

When they arrived at the police station, Nielsen asked the receptionist if she was familiar with the murder and said defendant told him that he was the one who did it. The defendant said nothing. The receptionist testified she thought the defendant was under the influence or drunk.

Approximately five minutes later an officer entered and was told by Nielsen that defendant believed himself to be guilty of murder. Defendant gave an affirmative response when the officer asked him if that were true. The officer then took defendant and

Nielsen to an interview room where defendant was read his *Miranda* rights.[1] Defendant indicated he understood these rights and answered questions regarding his name, address and date of birth. Defendant was 17 years old but was functioning at an intellectual-educational level of a 12 or 14 year old child. Defendant was then informed he was a suspect. He was handcuffed and taken to the Detective Bureau in the same building.

Defendant was then placed in a small custody room where the handcuffs were removed. Detective Kagey, who had been assigned to the homicide case, entered and Nielsen told Kagey that he had advised defendant not to make any statements until defendant had an opportunity to speak with counsel. Defendant was seated next to Nielsen but remained silent. Kagey asked defendant his name, age, and address and then directed his conversation to Nielsen. Kagey askey him to step into the hallway, where outside defendant's presence Kagey told Nielsen that defendant would have to convince him that defendant was involved in the murder before he could arrest defendant. They reentered the room, and Nielsen again advised defendant not to speak without an attorney.

Kagey then took defendant and Nielsen to a larger room to wait for Kagey's partner, Detective Blodgett.

[1] *Miranda v. Arizona*, 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974 (1966).

Defendant told Kagey that he was an alcoholic, had been hospitalized for treatment and desired more help. Kagey then told defendant that "if in fact he was responsible for this [murder] and if he did commit this act that he should become involved in the [court] system [because] [t]hat's the only way I could get him any help."

Kagey and Nielsen again went out into the hallway away from defendant, and Nielsen again requested an attorney for defendant. This time Kagey told Nielsen that they could get an attorney but "if you [Nielsen] are personally convinced that he committed this crime and if you are sure he's responsible for this and an attorney tells Shawn not to say a word, then Shawn goes out the door; we don't have a case against Shawn McGrew." Nielsen then requested to speak to defendant alone, and Kagey agreed. Nielsen told defendant that Kagey had told him "if he thought he did something wrong that he should just come clean with it." Nielsen then informed Kagey that defendant had decided to give a statement to the officers.

About this time Detective Blodgett arrived with a tape recorder. Nielsen was told to leave. The officers then advised defendant of his *Miranda* rights and obtained a signed waiver. Defendant's subsequent statements were incriminating. His motion to suppress was denied after hearing, and the statements were introduced at trial.

Defendant bases his appeal on alleged violations of the Fifth Amendment guarantee against self-incrimination as well as the Sixth Amendment right to counsel, as defined in *Miranda v. Arizona,* 384 US 436, 86 S Ct 1602, 16 L Ed 2d 694, 10 ALR3d 974 (1966). In denying the defendant's motion to suppress, the trial court concluded the only conflict in the evidence was whether defendant had orally asserted his right to remain silent. Nielsen testified the defendant had said he did not want to talk, while the police detectives testified he did not. The court found that defendant probably did not assert the right to remain silent, but if he did he subsequently waived it. The court also held that the right to have counsel present is a personal right which must be asserted by the defendant and Nielsen's several requests for counsel for defendant were not sufficient to invoke the strictures imposed by *Miranda* on police interrogation. We reverse.

The brief and arguments of the parties center predominantly on the issue of whether Nielsen could assert a right to counsel on behalf of defendant. The issue cannot be reduced to an inquiry of whether defendant asserted his right to remain silent or to have an attorney present. Those rights exist whether or not a defendant asserts them, and the police may not question a defendant until these rights are waived.

We need not decide if defendant asserted, through Neilsen, the right to counsel, for we conclude the waiver obtained by the police was not valid.

Concerning waiver of rights, the Supreme Court in *Miranda* said:

> "* * * But a valid waiver will not be presumed simply from the silence of the accused after warnings are given or simply from the fact that a confession was in fact eventually obtained. * * *
>
> "* * * * *
>
> "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege. * * *" 384 US at 475-76.

The prosecution has the burden of demonstrating a knowing, intelligent and voluntary waiver before any statement will be admissible. *Miranda v. Arizona, supra.* That burden includes a requirement that the prosecution show the waiver was not induced by the police. Once an accused has been advised of his rights the waiver, which must precede interrogation, must not be induced by the law enforcement agents. It must be a free will choice of the accused. The police may ask the defendant if he will waive his right to silence, but they may not persuade him to do so. *State v. Johnson,* 37 Or App 209, 586 P2d 811 (1978); *State v. Turner,* 32 Or App 61, 573 P2d 326 (1978); *State v. Paz,* 31 Or App 851, 572 P2d 1036 (1977), *rev den* 282 Or 189 (1978); *State v. Dyke,* 19 Or App 705, 528 P2d 1073 (1974);

State v. Garrison, 16 Or App 588, 519 P2d 1295, *rev den* (1974); *State v. Suggs,* 13 Or App 484, 511 P2d 405 (1973). Each of these cases just cited involved *inter alia,* a question of waiver after the defendant had requested counsel. This is not a material factor distinguishing the issue of waiver in the case at bar. The waiver, at whatever juncture it occurs, must satisfy the requirement that it be voluntary. The right to counsel and the right to remain silent existed whether or not the defendant verbalized his intent to assert these rights, and the requirement that these rights be waived prior to interrogation does not evaporate if defendant does not assert them.

The issue is the voluntariness of the waiver at the time it was given. The events preceding the waiver reflect on voluntariness as does the character, personality and condition of the defendant. Defendant was 17 years old with the mental acuity of a 12 or 14 year old chilc. He had alcohol problems severe enough to require hospitalization on at least two occasions. He was obviously relying on his friend Nielsen for guidance and was separated from Nielsen at the time the waiver card was signed and the incriminating statements made.

Prior to the waiver, the detective, in response to defendant's request for help with his alcohol problem, told defendant unless he told the police about his

involvement in the murder they could not get him involved in the court system where he could get help. This offer of assistance, conditioned upon the defendant confessing to the crime, was obviously designed to induce defendant to give up the right to remain silent. *See State v. Turner, supra.*

In addition, again prior to obtaining the waiver, the detective told Nielsen "if you [Nielsen] are personally convinced that he committed this crime and if you are sure that he's responsible for this and an attorney tells Shawn not to say a word, then Shawn goes out the door * * *." This message was communicated to defendant by Nielsen, who told defendant the detective had said "if he thought he did something wrong that he should just come clean with it." Although the statement was made to Nielsen and not the defendant, the police were aware of defendant's reliance on Nielsen and that the message would be communicated to the defendant. Again, the obvious intent of the message was to induce defendant to give up the right to remain silent.

The trial court found, based on the evidence, that defendant had waived his right to remain silent. As indicated, the evidence surrounding the waiver was not disputed. Although the court concluded there was a proper waiver that was a legal conclusion based on settled facts and we are not bound to accept it. *State v.*

Warner, 284 Or 147, 585 P2d 681 (1978); *State v. Johnson, supra; State v. Garrison, supra.* We conclude the state has failed to demonstrate the waiver was voluntary and not merely a response to the detective's inducement.

Reversed and remanded for new trial.

Appendix B

SUPREME COURT
COURT OF APPEALS

April 18, 1979

Walter L. Barrie
Solicitor General
100 State Office Building
Salem, Oregon 97310

Re: State v. Shawn Robert McGrew
CA 10780 SC 26129

Dear Mr. Barrie:

The Supreme Court on April 17, 1979, denied Respondent's Petition for Review in the above entitled matter.

Very truly yours,

Marilyn Hartley
Supreme Court Calendar Clerk

MH/sq
cc:
James E. Mountain, Jr.
Richard M. Rogers

Appendix C

IN THE CIRCUIT COURT OF THE STATE OF OREGON FOR THE COUNTY OF MULTNOMAH

STATE OF OREGON, Plaintiff,	)	No. C 77-08-11378
vs.	)	MOTION TO SUPPRESS
SHAWN ROBERT McGREW, Defendant.	)	

Defendant moves the Court for an Order suppressing any and all evidence and testimony regarding any statements made by him on or about June 24, 1977 to Detectives Blodgett and Kagaey of the Portland Police Bureau on the grounds that the statements were (1) involuntary and (2) obtained in violation of defendant's constitutional rights guaranteed by *Miranda v. Arizona.*

By /s/ RICHARD M. ROGERS
Attorney for Defendant

AUTHORITIES

U. S. Const., Amend. V, VI and XIV (1).
OR. Const., Art. I, §§ 10, 11 and 12
ORS 136.425(1).
Brown v. Mississippi, 297 US 278 (1936).

Gallegos v. Colorado, 384 US 49 (1962).
Miranda v. Arizona, 384 US 436 (1966).
Johnson v. Zerbst, 304 US 458 (1938).
State v. Brewton, 238 Or 590 (1964).
Ferguson and Douglas, *A Study of Juvenile Waiver,* 7 San Diego L. Rev. 39 (1970).

Supreme Court, U. S.
FILED
AUG 25 1979
MICHAEL RODAK, JR., CLERK

IN THE SUPREME COURT

OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-77

STATE OF OREGON,

Petitioner,

v.

SHAWN ROBERT McGREW,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INDEX

	Page
Opinion below.	1
Question presented	1
Statement of facts	3
Reasons for denying the writ . .	8
Conclusion	14

CITATIONS

Johnson v. Zerbst, 304 US 458, 58 SCt 1019, 82 LEd 1461 (1938).	11, 12
Miranda v. Arizona, 384 US 436, 86 SCt 1602, 16 LEd 2d 694 (1966).	11
State v. McGrew, 38 Or App 493, 590 P2d 755 (1979).	7, 8, 10 11, 12
United States v. Johnston, 268 US 220 (1925).	13

IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1979

No. 79-77

STATE OF OREGON,

Petitioner,

v.

SHAWN ROBERT McGREW,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Shawn Robert McGrew, respectfully requests that this court deny the petition for writ of certiorari, seeking review of the opinion of the Oregon Court of Appeals in this case. That opinion is reported at 38 Or App 493, 580 P2d 755.

QUESTION PRESENTED

Was the decision of the Oregon Court of Appeals -- that petitioner had failed to meet its burden of demonstrating that

respondent's waiver of his right to remain silent was voluntary -- incorrect and unreasonable where that court found the following circumstances surrounding the purported waiver:

First, that respondent was "17 years old with the mental acuity of a 12 or 14 year old child [and] he had alcohol problems severe enough to require hospitalization on at least two occasions;"

Second, that the waiver occured after respondent had been taken into custody at the police station as a murder suspect;

Third, that the waiver followed an "offer [to respondent] of assistance [for his alcohol problem], conditioned upon the defendant confessing to the crime, [and which] was obviously designed to induce defendant to give up the right to remain silent;" and

Fourth, that the waiver followed an additional statement by the police detective "the obvious intent of [which] was to induce defendant to give up the right to remain silent."?

SUPPLEMENTAL STATEMENT OF FACTS

On June 27, 1977, the body of a murdered woman was found on the grounds of a synagogue in Portland (Tr 64-65). Subsequently Mike Nielsen, a friend of defendant, heard that defendant believed he committed the murder (Tr 180). Nielsen contacted defendant and was told by defendant that he wished to turn himself in (Tr 161). Nielsen accompanied defendant to the police station and, enroute, told defendant that he did not have to say anything when they got to the police station and that defendant could wait until he talked to an attorney (Tr 160).

When they arrived at the police station, Nielsen asked the receptionist if she was familiar with the murder and said defendant told him that he was the one who did it (Tr 12). The defendant said nothing (Tr 12). The receptionist testified she thought the defendant was under the influence or drunk (Tr 18-19).

Approximately five minutes later an officer entered and was told by Nielsen that defendant believed himself to be

guilty of murder (Tr 16, 30). Defendant gave an affirmative response when the officer asked him if that were true (Tr 30). The officer then took defendant and Nielsen to an interview room where defendant was read his Miranda rights (Tr 30-31). Defendant indicated he understood these rights and answered questions regarding his name, address and date of birth (Tr 31-32). Defendant was then informed he was a suspect, was handcuffed and taken to the Detective Bureau in the same building (Tr 35-36).

Defendant was then placed in a small custody room where the handcuffs were removed (Tr 36, 40). Detective Kagey, who had been assigned to the homicide case, entered and Nielsen told Kagey that he had advised defendant not to make any statements until defendant had an opportunity to speak with counsel (Tr 66-67). Defendant was seated next to Nielsen but remained silent (Tr 75). Kagey asked defendant his name, age and address and then directed his conversation to Nielsen (Tr 75). Kagey asked him to step into the hallway, where outside defendant's

presence Kagey told Nielsen that Defendant would have to convince him that defendant was involved in the murder before he could arrest defendant (Tr 75). They reentered the room, and Nielsen again advised defendant not to speak without an attorney (Tr 95).

Kagey then took defendant and Nielsen to a larger room to wait for Kagey's partner, Detective Blodgett (Tr 77-78). Defendant told Kagey that he was an alocholic, had been hospitalized for treatment and desired more help (Tr 78, 92, 94, 509). Kagey then told defendant that "if in fact he was responsible for this [murder] and if he did commit this act that he should become involved in the [court] system [because] [t]hat's the only way I could get him any help" (Tr 94).

Kagey and Nielsen again went out into the hallway away from defendant, and Nielsen again requested an attorney for defendant (Tr 93). This time Kagey told Nielsen that they could get an attorney but "if you [Nielsen] are personally convinced that he committed this crime and if you are sure he's responsible for this

and an attorney tells Shawn not to say a word, then Shawn goes out the door; we don't have a case against Shawn McGrew" (Tr 93). Nielsen then requested to speak to defendant alone, and Kagey agreed (Tr 96). Nielsen told defendant that Kagey had told him "if he thought he did something wrong that he should just come clean with it" (Tr 174). Nielsen then informed Kagey that defendant had decided to give a statement to the officers (Tr 97).

About this time Detective Blodgett arrived with a tape recorder (Tr 80, 110). Nielsen was told to leave (Tr 183). The officers then advised defendant of his Miranda rights and obtained a signed waiver (Tr 81, 111).

The trial court found that, from the point the handcuffs were put on him, defendant was in custody (Tr 193).

The Court of Appeals summarized defendant's condition at that time as follows:

> "Defendant was 17 years old with the mental acuity of a 12 or 14 year old child. He had alcohol problems severe enough to require hospitalization on at least two occasions. He was obviously relying on his friend

> Nielsen for guidance and was separated from Nielsen at the time the waiver card was signed and the incriminating statements made" 38 Or App 493, 499.

The Court of Appeals further found that:

> "Prior to the waiver, the detective, in response to defendant's request for help with his alcohol problem, told defendant unless he told the police about his involvement in the murder they could not get him involved in the court system where he could get help. This offer of assistance, conditioned upon the defendant confessing to the crime, was obviously designed to induce defendant to give up the right to remain silent.
>
> "In addition, again prior to obtaining the waiver, the detective told Nielsen 'if you [Nielsen] are personally convinced that he committed this crime and if you are sure that he's responsible for this and an attorney tells Shawn not to say a word, then Shawn goes out the door * * *.' This message was communicated to defendant by Nielsen, who told defendant the detective had said "if he thought he did something wrong that he should just come clean with it." Although the statement was made to Nielsen and not the defendant, the police were aware of defendant's reliance on Nielsen and that

> the message would be communicated to the defendant. Again, the obvious intent of the message was to induce defendant to give up the right to remain silent" 38 Or App 493, 499, 590 P2d 755, 758.

The Court of Appeals then concluded:

> "[T]he state has failed to demonstrate the waiver was voluntary and not merely a response to the detective's inducement." 38 Or App 493, 500, 590 P2d 755, 759.

REASONS WHY THE WRIT SHOULD BE DENIED

I.

The first Question Presented - the applicability of the requirements of Miranda v. Arizona, to this case - is not properly before this Court because petitioner never raised this question in the State courts and they were never, therefore, given the opportunity to consider and decide the question.

Petitioner's only argument to the Oregon Court of Appeals was as follows:

> "Respondent [State of Oregon] urges this court to adopt a general voluntariness standard with respect to waiver of a previously asserted right to remain silent and maintains that, under a voluntariness standard,

> defendant in this case waived his right to remain silent." Respondent's Brief at page 5.
>
> "If Mr. Nielsen's purported assertion of defendant's privilege was adequate, respondent maintains that defendant waived his right to counsel. . ." Respondent's Brief at page 9.

In its Petition For Review by the Oregon Supreme Court, petitioner stated that:

> "The issue in this case is whether defendant's waiver of his Miranda rights was voluntary." Petition For Review at page 8.

II.

The first Question Presented is not raised by the record.

Petitioner questions the applicability of the requirements of Miranda v. Arizona, where respondent "arriv[ed] at the police station, express[ing] an intent to confess to an unsolved murder." But there is no evidence in the record that defendant expressed such an intent. The record is to the contrary. The Oregon Court of Appeals noted that:

> "On route [to the police station], Nielsen told defendant that he did

not have to say anything when they got to the police station and that defendant could wait until he talked to an attorney." 38 Or App 493, 495.

Detective Kagey testified that:

"Mr. Nielsen advised me that he had brought Shawn to the police station and that he had advised Shawn to surrender himself in connection with this case and that he had advised Shawn not to make any statements until he had had a chance to talk to an attorney." (Tr 66-67)

Michael Nielsen testified that:

". . .There was some exchange about coming in and confessing. 'Did you you come in to tell us something or to confess?' Or something like that. I said that he didn't want to say anything until he saw an attorney." (Tr 166)

The trial court noted that:

"The defendant's position is he went there but was not going to talk to [the police] but told them he did a murder and was turning himself in." (Tr 187)

In the context of this record the first Question Presented in the petition could be resolved only by rendering an impermissible advisory opinion.

III

The decision of the Oregon Court of Appeals was in accord with settled law and was correct and reasonable in light of the particular facts found by the trial court and by the Court of Appeals.

The Court of Appeals held, simply, that petitioner had failed in its burden of proof. The burden applied by that Court is recited in the opinion of the Court as follows:

> "The prosecution has the burden of demonstrating a knowing, intelligent and voluntary waiver before any statement will be admissible." 38 Or App 493, 498.

This is a correct statement of the law, as settled by this Court in Miranda v. Arizona, 384 US 436, 475, 476, 86 SCt 1602, 16 LEd2d 694 (1966), where this Court noted:

> "This Court has always set high standards of proof for the waiver of constitutional rights, Johnson v. Zerbst, . . ."

The criteria to be considered by the court in determining whether or not the prosecution has met that burden was set

forth by this Court as follows in Johnson v. Zerbst, 304 US 458, 464, 58 SCt 1019, 82 LEd 1461 (1938):

> "The determination. . .must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused."

It is clear from the opinion of the Oregon Court of Appeals that that Court did consider these criteria:

> "The issue is the voluntariness of the waiver at the time it was given. The events preceeding the waiver reflect on voluntariness as does the character, personality and condition of the defendant." 38 Or App 493, 499.

Petitioner's real argument is with the facts as found by the trial court and by the Court of Appeals. Petitioner argues that the finding of the Court of Appeals that "defendant was 17 years old with the mental acuity of a 12 or 14 year old child," is "inaccurate and highly misleading;" that the "Court of Appeals plainly erred in stating as a fact that the police were aware" that a message found by that Court to have obviously been intended to induce respondent to give up his right to remain silent would be communicated to the

respondent; that the finding of the Court of Appeals that "the obvious intent of the message [from Detective Kagey to Nielsen] was to induce defendant to give up the right to remain silent," is "curious;" and that the finding of the Court of Appeals that a offer of medical assistance, conditioned upon a confession, was therefore designed to induce defendant to give up his right to remain silent, "is surely not tenable. The statement is a simple truism. . ."

In essence, petitioner asks this Court to make another review of the lengthy trial record. This Court has ruled that such fact canvassing is not a task to be served by a grant of certiorari: "We do not grant a certiorari to review evidence and discuss specific facts." United States v. Johnson, 268 US 220, 227 (1925). Moreover, in the realm of factual review and analysis, the rulings of the courts below should be treated with and should be entitled to great weight.

In the present case, petitioner raises only questions turning entirely upon the particular facts of this case. Certiorari,

therefore, should be denied.

CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

RICHARD M. ROGERS
Counsel for Respondent